

*a***PERWIRA AFFIN BANK BHD****v.****ORISON SDN BHD & ORS***b*

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-2249-1999]
21 NOVEMBER 2003

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CIVIL PROCEDURE: *Summary judgment - Appeal against - Bank's claim against principle borrower and guarantors - Whether there was defect in pleadings - Whether sufficient in itself to refuse application - Whether there were triable issues - Rules of the High Court 1980, O. 14*

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This was the defendants' appeal against the decision of the learned senior assistant registrar entering summary judgment under O. 14 of the Rules of the High Court 1980 ('RHC') in favour of the plaintiff bank. The plaintiff had granted the first defendant various banking facilities and those that were the subject matter of the present dispute related to an overdraft facility and a "banker's acceptances" facility. The loans were secured by three debentures and a so-called "sinking fund" whereby the first defendant was to periodically put money in fixed deposits to be held in the bank. The second and third defendants, directors of the first defendant, were the guarantors. The plaintiff, upon the first defendant being unable to maintain payments into the sinking fund, proceeded to: (a) debit automatically the first defendant's overdraft where it automatically showed in its accounts that the first defendant had drawn on the overdraft when it had actually not done so; and (b) deposit the sums that were thus debited into the fixed deposits in the bank in the first defendant's name. The defendants, thus, contended that: (i) the contract was against public policy and should not be enforced by the court; (ii) the sinking fund arrangement operated by the plaintiff was highly irregular as it goes against the grain of the Banking and Financial Institutions Act 1989; and (iii) the actions of the plaintiff would entitle the relevant authorities to revoke its banking license.

*e**f**g***Held:***h*

[1] The defendant's submissions that the contract was against public policy and unenforceable gave rise to triable issues. This was not a plain and straightforward case; it was devious and crafty, and a trial was the best solution. The defendant's contention that the plaintiff's claim for interest would fail as there was no agreement between the parties on the rate of

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interest brought the present appeal outside the realm of an O. 14 application. In the context of the present appeal, a full trial would reveal the details of all the payments that have been made and whether those payments were properly made. (pp 265 d, 266 f, 269 c-d & 270 a) a

[2] No proper particulars of the debt claimed by the plaintiff had been pleaded in the amended statement of claim. It must be emphasised that the certificate of conclusiveness of debt merely dispensed with the requirement of formal proof but not with the requirement of particulars of the pleadings. This defect in the pleadings was in itself sufficient to refuse an application for summary judgment. (p 270 e-g) b

[3] The remedy of summary judgment was a drastic one and should only be utilised in very clear cases. In the present case, the defendants' appeal must be allowed as they had raised *bona fide* triable issues. In the interest of justice, the plaintiff would be required to file form 63 under O. 34 of the RHC, the defendants would file their statement of defence and the parties would explore the possibility of disposing this case under O. 14A of the RHC. (p 270 h & 271 b-e) c

[Ordered accordingly.] d

Case(s) referred to:

- Alliance (Malaya) Engineering Co Sdn Bhd* [1974] 2 MLJ 94 (*refd*) e
- Benyon v. Nettleford* [1850] 3 Mac & G 94 (*refd*)
- Bradley v. Chamberlyn* [1893] 1 QB 439 (*refd*)
- British and Commonwealth Holding plc v. Quadrex Holdings Inc* [1989] 1 QB 842 (*refd*)
- Chen Heng Ping v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690 CA (*refd*) f
- Chong Chow Fong v. Ban Tuck (M) Sdn Bhd* [1983] 2 CLJ 25; [1983] CLJ (Rep) 508 HC (*refd*)
- Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 QB 147 (*refd*)
- Collins v. Blantern* [1767] 2 Wils KB 341 (*refd*)
- Gas Light and Cove Co v. Turner* [1840] 6 Bing NC 324 (*refd*) g
- Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd* [1988] 2 MLJ 397 (*refd*)
- Daya Anika Sdn Bhd v. Kuan Ah Hock* [1998] 5 CLJ 200 HC (*refd*)
- Egerton v. Earl Brownlow* [1853] 4 HL Cas 1 (*refd*)
- Harrison v. Bottenheim* [1872] 26 WR 362 (*refd*)
- Hilton v. Eckersley* [1855] 6 E & B 47 (*refd*) h
- Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* [1987] 1 MLJ 139 (*refd*)
- Janson v. Driefontein Consolidated Mines Ltd* [1902] AC 484 (*refd*)
- Kim Seng Hotel and Coffee Shop v. Chuah Teong Buan* [1971] 1 MLJ 233 (*refd*)
- Kok Hoong v. Leong Cheong Kweng Mines, Ltd* [1964] 1 All ER 300 (*refd*)
- Lim Goh Huat v. Saw Keng See* [1998] 6 MLJ 600 HC (*refd*)
- Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667 SC (*refd*) i

- a** *Lloyd's Banking Co v. Ogle* [1876] LR 1 Ex D 262 (**refd**)
Lowe v. Peers [1768] 4 Burr 2225 (**refd**)
Malayan Banking Bhd v. Yeo Sun Tong [1999] 4 CLJ 425 HC (**refd**)
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC (**refd**)
Mercantile Credit Co Ltd v. Hamblin [1964] 1 All ER 680 (**refd**)
- b** *Miles v. Bull* [1968] 3 All ER 632 (**refd**)
Mogul Steamship Co v. McGregor Gow & Co [1829] AC 25 (**refd**)
National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC (**refd**)
Perkapalan Shamelin Jaya Sdn Bhd v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA (**refd**)
- c** *Re Mahmoud and Ispahani* [1921] 2 KB 716 (**refd**)
St John Shipping Corp v. Joseph Rank Ltd [1957] 1 QB 267 (**refd**)
South Engineers Sdn Bhd v. Unknown Occupiers of Lot 134 K, Jalan Chan Sow Lin, Kuala Lumpur [1998] MLJU 444 (**refd**)
Syn Lee & Co Ltd v. Bank of China [1961] MLJ 87 (**refd**)
- d** *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 FC (**refd**)
Tunku Kamariah Aminah Maimunah Iskandariah Sultan Iskandar v. Dato' James Ling Beng King [1989] 2 CLJ 244; [1989] 2 CLJ (Rep) 658 HC (**refd**)
United Malayan Banking Corp Bank v. Palm and Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 (**refd**)
- e** *Wallingford v. Mutual Society* [1880] 5 App Cas 685 (**refd**)
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 (**refd**)

Legislation referred to:

- Banking Act 1973, s. 23A
 Banking and Financial Institutions Act 1989, ss. 2(1), 60(1), (4)
- f** Contracts Act 1950, ss. 24, 30, 79
 Courts of Judicature Act 1964, s. 16(i)
 Rules of the High Court 1980, O. 14A, O. 42 r. 2
 Contracts Act 1950 [India], s. 29

Other source(s) referred to:

- g** Charles J Woelfel, *Encyclopedia Of Banking & Finance*, 10th edn, p 1057
Chitty on Contracts, 27th edn, vol 1, para 3-021, p 179
Halsbury's Laws of England, 4th edn, vol 32, p 234
Pollock & Mulla's Indian Contract & Specific Relief Act, 12th edn, p 882

- h** *For the plaintiff - Chan Kok Keong; M/s Shook Lin & Bok*
For the defendants - K Shanmuga; M/s Kanesalingam & Co

Reported by Suresh Nathan

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JUDGMENT

Abdul Malik Ishak J:**Introduction**

This is the defendants' appeal in encl. 20 against the decision of the learned senior assistant registrar ("SAR") entering summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC").

The claim by the plaintiff bank is against the first defendant – Orison Sdn Bhd as the principal borrower, and against the second and the third defendants as the guarantors. It is my judgment that the defendants have raised several issues which provide them with a defence to the plaintiff's claim. These several issues are triable and they should be adjudicated in open court. The O. 14 application is not appropriate in cases which involve lengthy argument by counsel on difficult questions of fact and law (*United Malayan Banking Corp Bank v. Palm and Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206, FC; and *British and Commonwealth Holdings plc v. Quadrex Holdings Inc* [1989] 1 QB 842, [1989] 3 All ER 492, CA). It is germane to note that the power to sign judgment under O. 14 applies to those straightforward and undefended cases (*Lloyd's Banking Co v. Ogle* [1876] LR 1 Ex D 262; and *Syn Lee & Co. Ltd v. Bank of China* [1961] MLJ 87) but the present appeal is not one of them. It is now trite law that summary judgment will not be granted when there is a *bona fide* triable issue to be determined and adjudicated (*Kim Seng Hotel and Coffee Shop v. Chuah Teong Buan* [1971] 1 MLJ 233, FC; and *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC); and when the alleged facts are of such a nature that it will entitle the defendant to interrogate the plaintiff (*Harrison v. Bottenheim* [1872] 26 WR 362, CA). Of crucial importance is this. That in an O. 14 the defendant may show cause by way of an affidavit (*Chen Heng Ping v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690) or otherwise (*Bradley v. Chamberlyn* [1893] 1 QB 439; *Alliance (Malaya) Engineering Co Sdn Bhd* [1974] 2 MLJ 94 at 98; *Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd* [1988] 2 MLJ 397 at 399; and *Perkapalan Shamelin Jaya Sdn Bhd v. Alpine Bulk Transport New York* [1998] 1 CLJ 424, CA) to the satisfaction of the court adjudicating the case (O. 14 r. 4(1) of the RHC). In the words of Lord Blackburn, the defendant must "condescend upon particulars" (*Wallingford v. Mutual Society* [1880] 5 App Cas 685 at 704, HL) and should not make a general averment amounting to a denial of indebtedness (*Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* [1987] 1 MLJ 139; *Chong Chow Fong v. Ban Tuck (M) Sdn Bhd* [1983] 2 CLJ 25; [1983] CLJ (Rep) 508 and *Daya Anika Sdn Bhd v. Kuan Ah Hock* [1998] 5 CLJ 200).

With these brief legal semantics, I will now proceed to narrate the facts.

a Factual Background

The plaintiff bank had granted the first defendant various banking facilities and those that are now the subject matter of the present dispute relate to an overdraft facility and a “Banker’s Acceptances” facility. The loans were secured, inter alia, by three debentures granted over a period of three years which created a fixed and floating charge over the first defendant’s assets. They were also purportedly secured by the so called “Sinking Fund” whereby the first defendant was to periodically put money in fixed deposits to be held in the plaintiff’s bank. The second and the third defendants were directors of the first defendant and so they were also required to give personal guarantees in respect of the facilities and they were the guarantors.

Essentially a guarantee is a promise by a person known as the “surety” or “guarantor” to answer for the default of another known as the “principal debtor” or to perform a promise to a third person known as the “creditor”. Section 79 of the Contracts Act 1950 defines a guarantee as a “contract to perform the promise, or discharge the liability of a third person in case of his default.” The case of *Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 differentiates between a contract of indemnity and a contract of guarantee. In the case of the former it is said that the promisor undertakes an original and independent obligation to indemnify whereas in the case of the latter it is said to be a collateral contract by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee.

Reverting back to the facts of the appeal, I must categorically state that the documents that show the agreements between the parties were the three letters of offer by the plaintiff and accepted by the first defendant and this would be followed by the three debentures, the three first party letters of set off, two to three memoranda of fixed deposits and the letters of guarantee. All these documents can be seen in the plaintiff’s affidavit in support of its application for summary judgment and that would be in encl. 16. But Mr. K. Shanmuga, the learned counsel for the defendants, submitted that the first defendant relied heavily on the memoranda of fixed deposits but unfortunately the defendants do not have a copy of that memoranda. I merely take note of what Mr. K. Shanmuga had submitted.

By way of an elaboration, it is interesting to point out that the plaintiff initially filed this civil suit and then applied for summary judgment. The plaintiff then amended its statement of claim to reduce the debt owing by approximately RM300. An application to amend the earlier application for summary judgment was withdrawn, and a fresh application for summary judgment was filed at the suggestion of the then deputy registrar and with the consent of the learned

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counsel on both sides. It was this second application for summary judgment that was heard partly with affidavits filed earlier and partly with the fresh affidavits. The application was then heard and allowed by the learned SAR and this very appeal in encl. 20 emanates from that decision. a

Briefly, these were the relevant factual matrix. The defendants have succeeded in setting out the *bona fide* triable issues and I must now allude to them, not in its order of priority. b

The Sinking Fund

The affidavit of Loh Siau Kiong that was affirmed on 7 March 2000 as seen in encl. 9 categorically alluded to the sinking fund. Again in encl. 11, the same deponent makes reference to the sinking fund. So to submit as was submitted by Mr. Chan Kok Keong, the learned counsel for the plaintiff, that the defendants' affidavits do not make any challenge either to the manner of operation of the sinking fund or to the right to debit the overdraft in order to meet the sinking fund requirement was lacking in its precision. c

The pertinent question to pose would be this. What was this sinking fund? It is in the form of money that was meant to be deposited into fixed deposits with the plaintiff bank that would eventually equal the amount of the credit facilities granted. I must say that this is quite a common form of security and it allows payments to be made into a fund over time when the borrower has been granted a long term debit whose payment date is far in the future so as to ensure that over time the money lent is secured by the payments into the said fund. The idea basically is that by the time the loan becomes due for payment, monies can just be transferred from the sinking fund. Charles J Woelfel in his book entitled "*Encyclopedia Of Banking & Finance*", 10th edn, at p. 1057 aptly wrote: d

SINKING FUND A fund created by setting aside out of earnings at stated intervals monies sufficient to provide for the payment of all, or part, of a long-term debt, such as an issue of bonds, or of a senior stock, such as preferred stock. The creation of a sinking fund is a method of amortization or extinguishment of a debt not yet matured, and is as binding on the debtor organization (obligator) as any other provision of the contract. e

A sinking fund is usually placed in the hands of a sinking fund trustee named under the terms of a mortgage deed. It may be invested in three ways: deposited in a bank to bear interest, invested in bonds of other organizations, and invested in bonds of the issuing organization. Since there is the opportunity for mismanagement of sinking fund investments, it is usually considered safer to apply sinking fund payments to the purchase of the company's own bonds being amortized, thus extinguishing the very debt for which the sinking fund was created. f

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- a* There are three ways in which a sinking may be invested in a company's own bonds: purchasing and keeping alive parts of other issues, purchasing and keeping alive parts of the issue being amortized, and purchasing and canceling parts of the issue being amortized. The latter method is usually considered the best since it not only decreases fixed charges, but increases the equity of the owners and strengthens the security of the bondholders.
- b* It also prevents mismanagement of the sinking fund and tends to stabilize the price by making a market for the bonds.
- The purchase of the bonds being amortized may be accompanied by open market transactions, or else the mortgage deed may provide for the purchase on certain interest dates of a certain number of bonds to be called by lot, usually at a premium. In the latter case, notice is given by the sinking fund agent that in accordance with the provisions of the mortgage and deed of trust it has designated by lot, for redemption on a certain date out of monies paid to the trustee by the issuing company, a certain sum of money for the redemption of bonds bearing the numbers stated in the notice.
- c*
- d* Now, both an overdraft and banker's acceptances are relatively short term debts, and this appears to be a highly unusual form of security. Common sense dictates that if one has money to put into fixed deposits, one has no need to draw on an overdraft nor to keep more money overdrawn than necessary. Money in fixed deposits ought to be just be paid in order to reduce the overdraft since
- e* the fixed deposits would have just been earning simple interest at a much lower rate than the high compound interest charged by the bank on the overdraft. The first defendant appealed to the plaintiff bank for a waiver of this alleged "security" for the facilities due to the harsh manner in which it operated. But the plaintiff bank declined to accede and told the first defendant's directors to
- f* "take it or leave it". The word "it" refers to the banking facilities. The first defendant certainly could not "leave it" because they had committed the funds already borrowed in their business and were not in a position, at that point of time, to repay. At any rate, the first defendant was not required to repay at that point of time. The first defendant would have wanted to reduce its indebtedness by paying what money they could secure in order to reduce the overdrawn amount, if any, rather than putting the money into fixed deposits. But the plaintiff refused to allow the first defendant to do so.
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- The situation became worse. When the first defendant was not able to maintain the payments into this "sinking fund", the plaintiff bank then proceeded to:
- h* (a) debit automatically the first defendant's overdraft where it automatically showed in its accounts that the first defendant had drawn on the overdraft when in fact it had not actually done so (see para. 7(b) of the affidavit in encl. 9); and
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- (b) proceed to deposit the sums that were thus debited into the fixed deposits in the plaintiff bank in the first defendant's name. *a*

The allegation of the defendants about this "auto-debit system" is not specifically denied by the plaintiff in its affidavits. The plaintiff too has not set out in detail the operation of the current account in order to rebut this allegation. So it can be surmised that this allegation is admitted. Interestingly, in technical terms, the plaintiff bank has compelled the borrower: *b*

- (1) to draw on the facilities when it had no need to and to pay a high rate of compound interest on the sum "borrowed" when it never saw that money purportedly borrowed; and *c*
- (2) to re-lend the money that was thus "borrowed" back to the plaintiff bank by placing it in fixed deposits for which the plaintiff bank would pay a much lower rate of simple interest to the borrower and which interest was only payable if the money was kept in fixed deposit for the full term of twelve (12) months. *d*

Mr. K. Shanmuga submits that the actions of the plaintiff bank both in the application of the sinking fund and by the abnormal operation of it has resulted in extreme prejudice to the first defendant. I merely take note of his submissions and I keep an open mind. He proceeds to submit along the following lines. That the sinking fund purportedly served as a security for the facilities given to the first defendant was merely a paper exercise. In the plaintiff bank's books the amount of deposits held by them would be shown to be higher as a result of these fixed deposits. This would have allowed the plaintiff bank to lend out more money to other borrowers. In actual fact, those sums were never physically deposited with the plaintiff bank. It was said to be a mere shadow footwork in the accounts. And yet the plaintiff bank would have paid out loans based on these shadow sums in the account. *e*

It is said that a bank cannot "auto-debit" a current account and thereby lending money to a borrower at a high rate of compound interest and then automatically place that money in fixed deposits with the same bank and thereby compelling the borrower to lend the same money back to the bank at a very much lower rate of simple interest. It is also said that the plaintiff bank was effectively charging a far higher sum as interest than they ought to have. In addition to the interest charged on the amount debited and put into fixed deposit, the plaintiff bank would then also charge interest on any amounts actually drawn by the first defendant which sums would have disbursed partly on the "shadow" security of the sums auto-debited and put into fixed deposit. Thus, it is said that when the first defendant made drawings on the overdraft during this auto- *f*

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- a* debit phase of the sinking fund scheme, it would have effectively been paying interest twice. This practice, according to Mr. K. Shanmuga, must be considered contrary to the public policy. Is that really so? The answer to this question gives rise to a triable issue that needs to be ventilated by way of a trial. Of course, no judge would be willing to tolerate any contract that would be
- b* injurious to society. It is difficult to list down what would amount to an injury to society. It varies from case to case and from time to time and from country to country. Thus, the court would look askance at a contract “to stipulate for iniquity” (*Collins v. Blantern* [1767] 2 Wils KB 341 at 350, per Wilmot LCJ) nor would a court enforce a contract that would be “contrary to the general
- c* policy of the law” (*Lowe v. Peers* [1768] 4 Burr 2225 at 2233, per Aston J.) or “against the public good” as envisaged in *Collins v. Blantern* (*supra*).

Proceeding further Mr. K. Shanmuga submits that the transaction between the plaintiff and the first defendant is not *bona fide* and that it does not come within the phrase “provision of finance” nor does it form the “security” for

d the credit facilities granted by the plaintiff within the meaning of these phrases as set out in the Banking and Financial Institutions Act 1989 (“BAFIA”). Mr. K. Shanmuga also submits that the unprofessional manner of operating the so-called “sinking fund” scheme by the plaintiff had caused prejudice to the defendants in the following ways:

- e* (a) it unnecessarily increased the indebtedness of the customer;
- (b) the first defendant as the borrower incurred a high tax burden by reason of the sinking fund arrangement because only the amount of interest charged which exceeded the interest earned on the fixed deposits was treated as a
- f* deduction from the income of the first defendant by the Inland Revenue;
- (c) the plaintiff bank’s shareholders were deceived into thinking that the loan was properly secured when it was not;
- (d) this kind of irresponsible lending can cause economic and social problems;
- g* (e) the money supposedly “lent” by the plaintiff bank in this manner could have been utilised in a more productive manner for a good purpose;
- (f) the lending by the plaintiff bank with an illusory security can damage the social economy; and
- h* (g) the money debited by the plaintiff bank from the first defendant’s overdraft account and deposited by the plaintiff with the plaintiff bank in a fixed deposit account was never actually lent to the first defendant because the plaintiff did not in fact part with the money.

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So the submission goes to the effect that the plaintiff's claim is illegal or tainted with illegality or contrary to public policy because of the following reasons: a

- (1) the plaintiff bank was carrying on a business other than that of "banking business" as defined in s. 2(1) of the BAFIA;
- (2) by granting loans on illusory security, the plaintiff bank ran counter to and fell foul to ss. 60(1) and 60(4) of the BAFIA and thereby prejudiced the defendants; and b
- (3) by inducing the first defendant to increase its indebtedness through the "sinking fund" the plaintiff bank had acted in such a manner so as to threaten the interests of the first defendant who were dealing with the plaintiff bank as its customer and the second and the third defendants who were dealing with the plaintiff bank as the guarantors. c

So the submissions for the defendants proceed along the following lines. That the contract is against public policy and should not be enforced by this court. That the sinking fund arrangement operated by the plaintiff bank is highly irregular as it goes against the grain of the BAFIA. That the actions of the plaintiff bank would entitle the relevant authorities to revoke its banking licence. That it is contrary to public policy for this court to permit the plaintiff bank to get away scot free. To say the least, these are interesting submissions and I keep my options open. I anxiously await for the full trial of this action. In *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v. Dato James Ling Beng King* [1989] 2 CLJ 244; [1989] 2 CLJ (Rep) 658, the court was confronted with a case that revolved around an agreement for the acquisition of more than 5% of the shares in a licenced bank. The approval of the Minister had not been obtained pursuant to s. 23A of the Banking Act 1973 – the precursor to the BAFIA, and the judge held that the agreement was contrary to public policy and his Lordship proceeded to strike out the claim for specific performance of that agreement. d

I say, by way of restating the law, that the court will not enforce a contract "which is expressly or impliedly prohibited by statute" (borrowing the sage words of Devlin J in *St John Shipping Corp v. Joseph Rank Ltd* [1957] 1 QB 267, 283). Once the court has ascertained that the contract is prohibited by the BAFIA, then the result would be that the contract would be held to be void and unenforceable within the meaning of s. 24 of the Contracts Act 1950. But this can only be done after the trial and not at this stage of the appeal. It is also opportune to state that a contract will be held to be void and unenforceable and even illegal if it infringes public policy. It is also appropriate to state that a contract that is held to be illegal at the time of its inception e

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- a* and therefore void ab initio must be treated as if it had not been made at all (see the speech of Lord Halsbury in *Mogul Steamship Co. v. McGregor Gow & Co* [1892] AC 25 at p. 39). All these legal semantics would be useful during the trial of this action.
- b* It is the duty of counsel conducting the case to draw the attention of the court to the issue of illegality (*Mercantile Credit Co Ltd v. Hamblin* [1964] 1 All ER 680, [1964] 1 WLR 423). And where there is nothing to show on the face of the contract that the contract is illegal, extrinsic evidence is admissible to prove the illegality even if the contract is made under seal (*Collins v. Blantern* (*supra*); *Gas Light and Coke Co v. Turner* [1840] 6 Bing NC 324, Ex Ch; and *Benyon v. Nettleford* [1850] 3 Mac & G 94). A contract which is injurious to the public or against the public good is invalidated on the grounds of public policy (*Egerton v. Earl Brownlow* [1853] 4 HL Cas 1 at 196; *Hilton v. Eckersley* [1855] 6 E & B 47 at 64; *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 151; and *Janson v. Driefontein Consolidated Mines Ltd* [1902] AC 484 at 491). It is purely a question of law whether an agreement is contrary to public policy.

- It is germane to mention that BAFIA is a piece of legislation passed by Parliament to ensure that Banks are properly licensed and regulated in order to ensure that our national economy is protected and that the interests of customers of the bank – be they borrowers or depositors of money, are not taken advantage of. Be that as it may, Mr. K. Shanmuga submits that the natural tendency is to look at the claim by the bank as a simple process of a lender of money asking for the return of the money. But he submits that the court must be vigilant in order to ensure that the plaintiff bank obeys the law and not flout it with impunity. He further submits that the plaintiff bank should not be allowed to take advantage of their customers. Surely all these considerations must be highlighted once again at the trial proper. In my judgment, this is not a plain and straightforward case. It is devious and crafty and a trial is the best solution. The justice of the matter demands that (*Miles v. Bull* [1968] 3 All ER 632).

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Interest

- f* It is submitted that the agreement between the plaintiff and the first defendant in respect of the interest charged on the banking facilities is void for reason of uncertainty as well as the fact that it is prohibited by law. In addition to that it is also submitted that the agreement seeks to circumvent the law and that it is also against public policy as it seeks interest upon interest that has not been duly agreed upon and it is also in the nature of a penalty which has not been proved to be an adequate compensation, if at all, any has been

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suffered. These are certainly thought provoking submissions and they bring the present appeal in the realm of *Miles v. Bull (supra)*. The trial is certainly an ideal solution.

The Purported Agreement For Interest Upon Interest Claimed Is Void For Uncertainty

The agreement between the plaintiff bank and the first defendant in relation to the interest charged on the facilities was for the plaintiff bank to vary at its own discretion the interest that it would charge on the loan. Mr. K. Shanmuga submits that this is not sufficient. He says that the actual rate must be agreed to according to the law otherwise it cannot be recovered. Now, the three debentures between the plaintiff bank and the borrower as seen in encl. 16 show the right of the plaintiff bank to vary the interest charged at its own discretion. Section 11.12 of the three debentures goes even further. It reserves to the plaintiff bank "the right to vary from time to time the terms and conditions of the said banking facilities hereby granted at the bank's sole and absolute discretion." Section 30 of the Contracts Act 1950 enacts as follows:

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

And in volume 1 of *Pollock & Mulla's Indian Contract & Specific Relief Act*, 12th edn at p. 882, s. 29 of the Indian Contracts Act is examined and that section is in *pari materia* with our s. 30 of the Contracts Act 1950 and the learned authors wrote:

A stipulation in a patta (lease) by which the tenant agreed to pay whatever rent the landlord might fix for any land not assessed which the tenant might take up, is void for uncertainty. Under such a patta, the landlord might fix any rent he liked, and the tenant might be liable for an unreasonable rent beyond the value of the land (*Ramasami v. Raja Gopala* [1887] 11 Mad 200). Where in an agreement for the sale of goods, the seller reserved the right to vary the price at will, there was no contract (*Bengal Agency and Stores Syndicate v. TN Khanna* [1945] 1 Cal 87, AIR 1949 Cal 231; *Rajkishor Mohanty v. Bonabehari Patnaik* AIR [1951] Ori 291 (no uncertainty if a reasonable price is to be fixed); *Haji Ayub v. Devji Bhanji* AIR [1953] Sau 91 (no uncertainty if it is to be at the market rate)).

In the same vein, the learned authors of *Chitty on Contracts*, 27th edn, vol. 1 at para. 3-021, at p. 179 aptly said:

Consideration would again be illusory where it was alleged to consist of a promise the terms of which left performance entirely to the discretion of the promisor.

- a* The Federal Court in the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 spoke of the perplexing interest in these words (see p. 253 of the report):

- b* Having regard to the provisions aforesaid, we consider – contrary to what the learned judge held – that resort to the loan agreement would still have not resolved the ambiguities in the default judgment in favour of the respondent, for the appellant would still be perplexed as to the amount of interest he would have to pay, and so he would be perplexed as to the total sum he would have to pay under the default judgment in order to avoid enforcement proceedings. We say so, because, in epitome, the default judgment, included an element of contractual interest at a fluctuating rate and when such interest was to run depended upon the absolute discretion of the respondent, and so was clearly uncertain.
- c*

- d* Now, even though the Federal Court in *Tuan Haji Ahmed's* case (*supra*) dealt with a default judgment, yet the Federal Court in essence held that when only the plaintiff could determine the amount owing under the judgment of the court then that judgment was uncertain. The reasoning of the Federal Court in *Tuan Haji Ahmed's* case (*supra*), dealing as it does with the question of “uncertainty” in a written document, should also apply to the question of whether or not the underlying agreement in itself is uncertain within the meaning of s. 30 of the Contracts Act 1950 and hence null and void. Even in England, when interest is payable at a variable rate it should bear some reference to an external yardstick. *Halsbury's Laws of England*, 4th edn, vol. 32 at p. 234 carries this interesting write up:
- e*

- f* In the absence of express provision in that behalf, the rate of interest may not be varied, although, if the money can be called in, this fact will usually be sufficient to make the borrower agree to a variation. Most building society and commercial mortgages provide for variation. This should be subject to some ceiling, lest it be arguable that the power to vary was invalid as unreasonable, or should be limited by reference to some external yardstick such as the retail price index or the Bank of England's minimum lending rate.
- g*

As There Is No Proper Agreement, The Plaintiff Bank Cannot Make A Claim For Interest Upon Interest

- h* Still on the issue of interest, I need to refer to s. 16(i) of the Courts of Judicature Act 1964 which provides that the rules of courts may be made to regulate the rate of interest payable on all debts.

Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties;

- i*

Then there is O. 42 r. 2 of the RHC which states that interest at a rate in excess of 8% after judgment is irrecoverable:

(unless the rate has been otherwise agreed upon between the parties)

It can clearly be seen that in both these provisions of the law, the requirement is that the “rate” of interest must be “agreed” “between the parties”. The ordinary meaning of these words are very clear. It is a purposive interpretation where all the parties to an agreement must actually come to a meeting of minds and agree on the actual rate of interest upon interest in order for it to be claimed. It is said that an agreement where one party may at its absolute discretion determine the interest chargeable is not a proper agreement. Flowing from that it is submitted that no agreement “between” the “parties” exists on the rate of compound interest or the rate of interest above the base lending rate or the base lending rate itself being claimed by the plaintiff as is required by s. 16(i) of the Courts of Judicature Act 1964 and O. 42 r. 2 of the RHC. At any rate, it is pertinent to note that there is no proper definition of base lending rate in any of the loan documents. For these reasons, the learned counsel for the defendants submit that the claim for interest must therefore fail. These submissions are certainly interesting and they bring the present appeal outside the realm of an O. 14 application. Be that as it may, it is further argued that since the agreement contains a provision as to interest upon interest which contravenes the law, then the entire agreement is said to be tainted with illegality. Payments have been made of interest illegally charged. It is always difficult nay frustrating at times to generalise about the effects of illegality. A lot would depend upon the circumstances of each case such as, for instance, as to the nature of the illegality in question as well as the state of mind of the contracting parties. Contracts which are illegal at common law on the grounds of public policy would certainly include the making of certain agreements prohibited by statute. A good instructive starting point would be the case of *Re Mahmoud and Ispahani* [1921] 2 KB 716. In that case the plaintiff sold linseed oil to the defendant in contravention of a statutory provision. The plaintiff was misled by the defendant into thinking that the defendant possessed a licence to deal in linseed oil, when in fact he had no such licence. Subsequently, the defendant refused to accept delivery of the linseed oil and claimed that the contract was illegal. The plaintiff claimed damages. The Court of Appeal held that as the defendant was unlicensed, the contract in question was prohibited by the Seed, Oils and Fats Order of 1919 and was, therefore, illegal. Despite the innocence of the plaintiff, his claim was unsuccessful.

- a* Now, in the context of the present appeal, the full trial would reveal the details of all the payments that have been made and whether those payments are properly made. It is not open to the plaintiff to argue that the defendants are estopped from raising the defences disclosed in the affidavits filed on their behalf because an illegality can never be waived (*Kok Hoong v. Leong Cheong Kweng Mines, Ltd* [1964] 1 All ER 300, PC; and *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667, SC)
- b*

Certificate Of Conclusiveness Of Debt Is Irregular

- c* It is germane to mention that the plaintiff's certificate of conclusiveness of debt had an error and that error had been corrected but the reason for the error had not been properly explained by the plaintiff bank. It is submitted that the fresh certificate of conclusiveness cannot be relied upon. It is vigorously submitted that if the plaintiff bank had made a mistake once, who is to say that it has not made another mistake in respect of the fresh certificate. It is pointed out that the defendants and this court have no way at all to ascertain
- d* that the sum that is said to be due and owing is in fact owing. The only way, so submits the learned counsel for the defendants, would be by way of a trial I would certainly agree with these salient submissions.

The Amended Statement Of Claim Is Defective As It Lacks The Necessary Particulars

- e* It must be borne in mind that no proper particulars of the debt claimed by the plaintiff have been pleaded in the amended statement of claim. The details of the debt, the interest charged on each occasion and the amount of payments back to the plaintiff have not been given by the plaintiff. It must be emphasised that the certificate of conclusiveness of debt merely dispenses with the
- f* requirement of formal proof but not with the requirement of particulars of the pleadings (*Malayan Banking Bhd. v. Yeo Sun Tong* [1999] 4 CLJ 425). The courts in *Lim Goh Huat v. Saw Keng See* [1998] 6 MLJ 600, and in *South Engineers Sdn Bhd v. Unknown Occupiers of Lot 134 K, Jalan Chan Sow Lin, Kuala Lumpur* [1998] MLJU 444 decided that a failure to condescend to
- g* particulars and the defects in the pleadings could not be remedied by affidavits evidence. And that a defect in the pleadings was in itself sufficient to refuse an application for summary judgment.

The Defendants Have Satisfied The Legal Requirements For A Trial

- h* It is trite law that the remedy of summary judgment is a drastic remedy and it should only utilised in very clear cases. The underlying philosophy of an O. 14 application has been aptly laid down by that great judge in the person of Hashim Yeop A. Sani SCJ in the case of *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246; ([1987] CLJ (Rep) 182). At p. 249 (p. 184) of the report, his Lordship brilliantly put it in this way:
- i*

The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment.

a

Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

b

I am of the considered view that the defendants have satisfied that burden. Bona fide triable issues have been raised. Some other reasons for a trial too have been raised. For all these reasons, I must allow the appeal in encl. 20 with costs.

c

This is an old case. A 1999 case which I inherited from my immediate predecessor. The case management of this case has yet to begin. So, in the interest of justice, I gave the following directions to the parties:

(1) the plaintiff is required to file Form 63 under O. 34 of the RHC;

d

(2) the defendants are to file their statement of defence; and

(3) the parties are to explore the possibility of disposing off this case under O. 14A of the RHC in an attempt to comply with the directive of the Honourable Chief Justice of Malaysia for speedy disposal of cases categorised as pre 2000 cases by June 2004.

e

*f**g**h**i*